TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 362

RAYMOND JEREAN KOLLER AND
MARTIN SILVERBROOK, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1958
CERTIORARI GRANTED NOVEMBER 17, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 12371, 12372

UNITED STATES OF AMERICA,

vs.

RAYMOND JEREAN KOLLER, Appellant in Appeal No. 12371,

and

MARTIN SILVERBROOK, Appellant in Appeal No. 12372.

Appeal from the Judgments of the District Court of the United States for the Eastern District of Pennsylvania (Civil Action No. 18994).

Appendix for Appellants

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

1955		
May	12.	Complaint filed.
May	12.	Summons exit.
Sep.	30.	Appearance of Davis S. Malis, Esq., for Martin Silverbrook, filed.
Oct.	3.	Motion of Morris Shneer for more definite statement filed.
Oct.	3.	Motion of Howard Albert Borden for more definite statement filed.
Oct.	15.	Motion of Stanley Bear for more definite statement filed.

Oct. 15. Motion of Joseph Henry Greenstone for more definite statement filed.

Oct. 15. Appearance of Bernard L. Lemisch Esq., for Joseph Henry Greenstone filed.

Oct. 15. Appearance of Lemisch & Ginsburg, Esq., for Stanley Bear filed.

Oct. 17. Appearance of Samuel B. Brodsky, Esq. for Edward Doman and Alexander Doman filed.

Oct. 17. Appearance of E. Bernard Schlegel, Esq. for Raymond Jean Koller, filed.

Oct. 17. Answer of Raymond Jerean Koller filed.

Oct. 19. Summons returned "on September 12, 1955 served Howard A. Borden and on September 23, 1955 served Morris Shneer and Martin Silverbrook and on September 27, 1955 served Stanley Bear, Raymond J. Koller, Alexander J. Doman, Edward Doman, and Morton Ziebman" and filed. As to Libers E. Shipton, Jack Leonard Erbaum, Joseph H. Greenstone and John D. Guille "not found".

Nov. 3. Stipulation of Counsel, W. Wilson White, and

[fol. 2] David S. Malis, Esq., acting for Martin Silverbrook only, that plaintiff have leave to file amended complaint within 20 days and Order approving same, filed.
Van.
11-3-55. Noted & notice mailed.

Dec. 8. Stipulation and Order re filing amended complaint, filed. 12-9-55 noted. W

Dec. 8. Amended Complaint filed.

Dec. 20. Motion by defendant Morris Shneer, for summary judgment filed.

Dec. 22. Amended Answer of Raymond Jerean Koller to amended complaint filed.

Dec. 28. Answer of Edward Doman and Alexander J. Doman to Amended Complaint filed.

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Jan. 9. Stipulation and Order approving stipulation extending time for filing answer of Martin Silverbrook etc. filed. Noted 1-10-56. G

Jan. 20. Answer of Joseph Henry Greenstone filed. Demand for jury trial filed.

Jan. 20. Answer of Stanley Bear and demand for jury trial filed.

Jan. 27. Motion of Martin Silverbrook to dismiss filed.

Mar. 13. Summons (2) on amended complaint exit as to John Daniel Guille and Jack Leonard Erlbaum.

Mar. 26. Argued sur motion of Morris Schneer for summary judgment CAV Kraft.

Mar. 27. Argued sur motion of Martin Silverbrook to Dismiss. CAV Kraft.

Apr. 16. Answer to Morton Zeidman to amended complaint filed.

Apr. 23. Summons as to Jack Leonard Erlbaum returned "on April 3, 1956 served" and filed. As to John Daniel Guille "not found".

May 4. Order to place case on trial list filed.

Jul. 16. [fol. 3] Opinion and Order of Court, Kraft J. denying motion of Martin Silverbrook to dismiss, and denying motion of Morris Shneer for summary judgment with leave to defendants to file answers within 20 days from this date, filed.
Noted & notice mailed 7-17-56. Kraft.

Jul. 21. Answer of Martin Silverbrook to Amended Complaint filed.

Aug. 3. Motion of Morris Shneer for reargument of Motion for summary judgment, filed.

Sept. 14. Reargument of Shneer's motion for summary Judgment. CAV Kraft.

Sept. 14. Motion of E. Bernard Schlegel, Esq., Attorney for Raymond Jerean Koller, for leave to withdraw appearance filed.

Sept. 25. Order of Court granting motion of E. Bernard Schlegel Esq., to withdraw his appearance filed. Noted & notice mailed 9-26-56. G.

Oct. 22. Memorandum and Order of Court denying motion of Morris Schneer for summary judgment etc. filed.
Noted 10-23-56. CWK.

Nov. 13. Stipulation and Order extending time for Morris Shneer to file answer to 11-30-56, filed. 11-14-56 Noted. Welsh.

Nov. 30. Answer of Morris Shneer to amended complaint filed.

1957

Apr. 3. Plaintiff's motion for summary judgment against Martin Silverbrook, filed.

Apr. 3. Plaintiff's motion for summary judgment against Raymond Joseph Koller, filed.

Apr. 16. Answer of Marin (sic) Silverbrook to plaintiff's motion for summary judgment, filed.

Apr. 18. Plaintiff's amended motion for summary judgment Martin Silverbrook filed.

Apr. 18. Plaintiff's amended motion for summary judgment against Raymond Joseph Koller filed.

[fol. 4] May 31. Appearance of Mathews E. Jaspan, Esq., for Howard Albert Borden filed.

May 31. Answer of Howard A. Borden to amended complaint filed.

Jun. 24. Argued sur Plff's motions and amended motions for summary judgment against Martin Silverbrook and Raymond J. Koller. CAV. Kraft.

Aug. 5. Memorandum, Kraft, J., finding that summary judgment may be entered for Plaintiff against Martin Silverbrook upon submission of an appropriate order, filed. Kraft.

Aug. 5. Memorandum, Kraft, J., finding that summary judgment may be entered for Plaintiff against

Raymond Joseph Koller upon submission of an appropriate order, filed. Kraft.

Aug. 7. Order entering Judgment in favor of Plaintiff against Raymond Joseph Koller, in $4,000. filed. 8-8-57. Noted & notice mailed. Kraft.

Aug. 7. Order of Court entering Judgment in favor of Plaintiff against Martin Silverbrook, in $2,000., filed. 8-8-57. Noted & notice mailed. Kraft.

Aug. 16. Notice of Appeal by Martin Silverbrook, defendant, filed. (8-19-57 copy to H. K. Wood.)

Aug. 16. Copy of Clerk's Notice to U. S. Court of Appeals filed.

Aug. 23. Appearance of Malis, Malis & Malis, Esqs., for Defendant Raymond Jerean Koller, filed.

Aug. 23. Notice of Appeal by Defendant Raymond Jerean Koller filed. (Copy to U. S. Attorney 8-24-57.)

Aug. 23. Certified copy of Clerk's notice to U. S. Court of Appeals filed.

Aug. 27. Bond for Costs on Appeal by Martin Silverbrook and Raymond J. Koller in the sum of $250. with Standard Accident Insurance Company as surety, filed.

Sep. 11. Record transmitted to U. S. Court of Appeals.

[fol. 5]

IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT—Filed December 8, 1955

1. This is a civil action brought by the United States of America, plaintiff, of which this court has jurisdiction under the Provisions of Title 28 U. S. C. §1345; §26 of the Surplus Property Act of 1944 (50 U. S. C. App. §1635), and §209 of the Federal Property and Administrative Services Act of 1949 (40 U. S. C. §489). The said Surplus Property Act of 1944 was repealed and re-enacted with modifications as the Federal Property and Administrative Services Act of 1949 and both the said statutes are herein

sometimes referred to for convenience as "the Acts of Congress."

2. Under and by virtue of the Acts of Congress hereinabove referred to, the United States of America established policies, procedures and regulations for the disposition of Government-owned surplus property and prescribed the Federal agencies which were to have the power and authority to administer the program, and to promulgate implementing regulations, orders, directives and policies consistent with the provisions, policies and purposes of the said Acts of Congress.

3. Included in the Acts of Congress and the administrative regulations and policies hereinabove referred to were provisions, regulations and policies extending special and favored treatment to veterans of World War II. The said provisions, regulations and policies authorized, inter alia, the acquisition by such veterans of property, including the kind hereinafter mentioned in this complaint, deemed to be war surplus, to enable the veterans to establish themselves in business, agriculture, professional life, and for their own personal use and not for resale. Pursuant to the provisions of the said Acts of Congress, such veterans would be issued [fol. 6] priority certificates by the War Assets Administration which would entitle them to preference in the purchase of surplus property of the United States of America through the War Assets Administration.

4. Commencing on or about the month of July, 1945 and continuing through at least the month of March, 1948, the defendants used or engaged in and caused to use or engage in fraudulent tricks, schemes and devices and entered into agreements, combinations, or conspiracies which used or engaged in or caused to use or engage in fraudulent tricks, schemes and devices for the purpose of procuring or obtaining or aiding to procure and obtain certain property hereinafter referred to, from the United States of America in connection with the procurement, transfer, and disposition the same under the Acts of Congress and administrative regulations above referred to.

5. In accordance with the aforesaid conspiracies, in order to obtain surplus property of the United States, the defen-

dants, Edward Doman, Alexander Joseph Doman, Raymond Jerean Koller, Morton Zeidman, Howard Alber (sic) Borden, Jack Leonard Erlbaum, John Daniel Guille, Martin Silverbrook, Joseph Henry Greenstone, Stanley Bear and Libers Ersal Shipton, who were veterans, made and submitted at Philadelphia, Pennsylvania, to the Smaller War Plants Corporation or its successor, the War Assets Administration, both agencies of the United States, applications containing false and fraudulent statements of material facts concerning the nature, type and/or value of the business or enterprise, or the proposed business or enterprise, of the veteran defendant, the business experience of the veteran defendant and the purpose of the veteran defendant in acquiring surplus property, i.e., not for resale. The dates and numbers of such applications, by whom made, and the surplus property applied for and acquired thereby [fol. 7] are set forth in detail in Exhibit "A" which is annexed hereto and made part of this complaint.

6. The defendant, Morris Shneer, used fraudulent tricks, schemes and devices in furtherance of said conspiracy to obtain surplus property as follows:

The defendant caused the veteran defendants to submit the aforesaid false and fraudulent applications to the Smaller War Plants Corporation or the War Assets Administration for the purpose of acquiring surplus property.

The veteran defendants acquired certificates from the Smaller War Plants Corporation or the War Assets Administration and sold them to the defendant, Morris Shneer, for a consideration; Morris Shneer then used the certificates to acquire the surplus property from the aforesaid agencies of the United States.

The veteran defendants purchased from the Smaller War Plants Corporation or the War Assets Administration surplus property in accordance with the terms of said priority certificates previously obtained by them from the aforesaid agencies of the United States which certificates would then be turned over to Morris Shneer when in fact Morris Shneer selected the property and the purchases were made on behalf of Morris Shneer.

The names of the veteran defendants with whom the defendant engaged in such fraudulent tricks, schemes and devices, the transactions in which the defendant, Morris Shneer, was engaged with such veteran defendants and the dates thereof, and the surplus property thereby acquired are set forth in detail in Exhibit "A" which is annexed hereto and made part of this complaint.

7. By reason of the aforesaid tricks, schemes and devices employed by the defendants in connection with the acquisition of the aforesaid property, the plaintiff suffered damages.

[fol. 8] Wherefore, plaintiff demands judgment against the said defendants, jointly and severally, for double damages pursuant to statute, plus the sum of Two Thousand ($2,000.00) Dollars for each fraudulent act committed by the defendants in violation of the said statute, together with costs of this suit.

/s/ W. Wilson White, United States Attorney.

/s/ Norman C. Henss, Assistant United States Attorney.

[fol. 9] EXHIBIT "A" TO AMENDED COMPLAINT

EXCERPT OF RELEVANT MATTER

"EXHIBIT A."

Veteran Defendant	RAYMOND JEREAN KOLLER	MARTIN SILVERBROOK
Approximate Date of Application	7-12-45 Additional application 6-3-46	3-15-46 Additional application 12-27-46 for allegedly lost certificate and other additions to applications
Application No.	V3 A 54	V-3A=13540
Property applied for	Auto Car-tractor Mack International and 28 or 30 ft. trailer, open top or closed 2-2½ ton 4x4 cargo trucks, 6 wheels, closed cab	1 truck K60 va, closed cab, 6x6, 2½ton 5 stake & platform bodies, 2½ ton and other additions to applications
[fol. 10] Property Acquired	Truck, ambulance, ½ ton Dodge 1941, Serial No. 8649657 ½ ton truck 1944 cargo, Serial No. 215838 1942 Chevrolet 4-door sedan, Serial No. 14VG-116520 and others	6 buses and 3 trucks
Transaction engaged in or property received by MORRIS SHNEER	Yes	Yes

[fol. 11]

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF RAYMOND JEREAN KOLLER TO AMENDED COMPLAINT—Filed December 22, 1955

Comes now the Defendant, Raymond Jerean Koller, by his attorney, E. Bernard Schlegel, Esquire, and answers the Amended Complaint as follows:

1. Defendant generally denies the allegations contained in paragraphs 1 through 7 inclusive of the Amended Complaint.

Wherefore, Defendant, Raymond Jerean Koller prays that the Complaint be dismissed.

/s/ E. Bernard Schlegel, 2901 P. S. F. Building, 12 South 12th Street, Philadelphia 7, Pa.

IN UNITED STATES DISTRICT COURT

MOTION OF MARTIN SILVERBROOK, ONE OF THE DEFENDANTS, TO DISMISS—Filed January 27, 1956

And Now, to wit, this 26th day of January, 1956, one of the defendants, Martin Silverbrook, moves the Court to dismiss the action for the following reason, to wit:

The action is barred by the Statute of Limitations.

Robert H. Malis, Attorney for Martin Silverbrook, One of the Defendants.

[fol. 12]

IN UNITED STATES DISTRICT COURT

OPINION—Filed July 16, 1956

Kraft, J. July 16, 1956

This civil suit was instituted by the United States against twelve defendants under Section 26(b)(1) of the Surplus Property Act of 1944[1] to recover the sum of $2,000 and

[1] Act of October 3, 1944, Chap. 479, 58 Stat. 765, as amended, repealed and re-enacted as Act of June 30, 1949, Chap. 288, Title II, Section 209, 63 Stat. 392, 40 U. S. C. A. §489.

double damages for each of sundry fraudulent transactions alleged to have been engaged in by the defendants. One defendant, Martin Silverbrook, filed a motion to dismiss; another, Morris Shneer, filed a motion for summary judgment. Both motions assert that the suit is barred by the five year statute of limitations[2] applicable to suits for civil penalties.

The critical question is whether the recoveries sought are penalties or damages. Defendants' argument is strongly persuasive that the sum of $2,000 claimed for each violation, in addition to double damages, is a civil penalty rather than damages. However, in Rex Trailer Co. v. United States, 350 U. S. 148, the Supreme Court, though discussing the difference between civil remedies and criminal penalties, did sufficiently indicate that it construed the provisions of Section 26(b)(1) to authorize "the recovery of a lump sum in damages."

[fol. 13]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT—July 16, 1956

Now, July 16, 1956, it is ordered that:

(1) Martin Silverbrook's motion to dismiss is denied.

(2) Morris Shneer's motion for summary judgment is denied.

(3) Both defendants are granted leave to file responsive answers within twenty days from this date.

C. William Kraft, Jr., J.

---

[2] "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued * * * " 62 Stat. 974, 40 U. S. C. A. §2462.

In United States District Court

Answer of the Defendant, Martin Silverbrook, to the Amended Complaint—Filed July 21, 1956

The answer of the defendant, Martin Silverbrook to the amended complaint, is as follows, to wit:

1. Admitted.

2. Admitted.

3. Admitted.

4. Denied. For further answer hereto the defendant, Martin Silverbrook incorporates by reference the averments set forth hereinafter in paragraph 5 hereof.

5. The defendant, Martin Silverbrook, denies the averments of this paragraph as applied to him and avers that he was engaged in the business of buying and selling used automobiles and trucks and other vehicles as a means of livelihood and that the purchases and application for prior-[fol. 14] ity made by him were properly made in accordance with his understanding of the rights afforded veterans to make purchases for furtherance of their own business activities. It is admitted that the defendant, Martin Silverbrook made application under dates of March 15, 1946 and December 27, 1946, as set forth in Exhibit "A" to the Complaint but it is averred that the defendant had legal right to make such applications under the law.

6. Not applicable to this defendant.

Second Defense.

Defendant, Martin Silverbrook, alleges that the specifications set forth in the plaintiff's complaint against him, the said defendant, Martin Silverbrook alone do not constitute a violation of the law as applied to him, the said Martin Silverbrook.

Third Defense.

Defendant, Martin Silverbrook, avers that the cause of action set forth in the complaint is barred by the Statute of Limitations.

Fourth Defense.

Defendant, Martin Silverbrook, avers that the Statute on which the government relies was intended to confer a benefit upon returning veterans and cannot be construed to authorize a suit of this nature against the class of persons intended to be benefited.

[fol. 15] Wherefore, the defendant, Martin Silverbrook, respectfully prays the action be dismissed against him.

/s/ David S. Malis, Malis, Malis & Malis, Esquires,
Attorneys for Martin Silverbrook.

In United States District Court

Plaintiff's Motion for Summary Judgment Against Martin Silverbrook—Filed April 3, 1957

Now comes the plaintiff, the United States of America, by its attorney, G. Clinton Fogwell, Jr., United States Attorney, and moves this Honorable Court for Summary Judgment in favor of the plaintiff and against the defendant Martin Silverbrook in the above-captioned cause.

In support of said Motion, the plaintiff refers to Indictment number 15993 (*United States of America* v. *Martin Silverbrook*) and judgment of conviction on all counts upon a plea of guilty thereon, the original of said Indictment and judgment of conviction being on record in this Court, and shows the Court that there is no genuine issue as to the material facts in the instant cause, since such facts have been conclusively settled and determined by the final judgment or decree of this Court in the aforesaid criminal action between the same parties.

By reason of the foregoing, the plaintiff submits that it is entitled, as a matter of law, to the above-requested relief, including judgment in favor of the plaintiff and against the defendant of liability for the unlawful acts recited in all counts of criminal indictment number 15993 and a $2,000. forfeiture, as provided for in Revised Statutes 3490 and [fol. 16] 5438, Title 40 U. S. C. §489(1), for the unlawful

acts recited in the one count of said indictment, or a total of $2,000.00 in forfeitures.

/s/ G. Clinton Fogwell, Jr., United States Attorney.

/s/ Henry J. Morgan, Assistant United States Attorney.

In United States District Court

Plaintiff's Motion for Summary Judgment Against Raymond Joseph Koller—Filed April 3, 1957

Now comes the plaintiff, the United States of America, by its attorney, G. Clinton Fogwell, Jr., United States Attorney, and moves this Honorable Court for Summary Judgment in favor of the plaintiff and against the defendant Raymond Joseph Koller in the above-captioned cause.

In support of said Motion, the plaintiff refers to Indictment number 15988 and judgment of conviction on all counts upon a plea of guilty thereon, the original of said Indictment and judgment of conviction being on record in this Court, and shows the Court that there is no genuine issue as to the material facts in the instant cause, since such facts have been conclusively settled and determined by the final judgment or decree of this court in the above-mentioned criminal action between the same parties.

By reason of the foregoing, the plaintiff submits that it is entitled, as a matter of law, to the above-requested relief, including judgment in favor of the plaintiff and against the defendant of liability for the unlawful acts recited in all counts of criminal indictment number 15988 and a $2,000. forfeiture, as provided for in Revised Statutes 3490 and [fol. 17] 5438, Title 40 U. S. C. §489(1), for each of the unlawful acts recited in each of the two counts of said indictment, or a total of $4,000.00 in forfeitures.

G. Clinton Fogwell, Jr., United States Attorney.

Henry J. Morgan, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

ANSWER OF MARTIN SILVERBROOK TO MOTION FOR SUMMARY JUDGMENT—Filed April 16, 1957

And Now, to wit, comes the defendant, Martin Silverbrook, by his attorney Robert H. Malis, and files this answer to plaintiff's motion for summary judgment in the above captioned cause for the following reason:

The said civil action was commenced by the government on May 12, 1955. The events complained of took place March 15, 1946. The action is therefore barred by the Statute of Limitations—Section 1047 revised Statutes. 28 U. S. C. Section 791, 1940, 28 U. S. C. A., 2462 limiting the right to institute such actions to a period of five years.

/s/ Robert H. Malis, of Malis, Malis & Malis, Attorneys for Defendant, Martin Silverbrook.

[fol. 18]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT AGAINST MARTIN SILVERBROOK—Filed April 18, 1957

Now comes the plaintiff, the United States of America, by its attorney, G. Clinton Fogwell, Jr., United States Attorney, and moves this Honorable Court for Summary Judgment in favor of the plaintiff and against the defendant Martin Silverbrook in the above-captioned cause.

In Support of said Motion, the plaintiff refers to Indictment number 15993 (*United States of America* v. *Martin Silverbrook*) and judgment of conviction on all counts upon a plea of guilty thereon, the original of said Indictment and judgment of conviction being on record in this Court, and shows the Court that there is no genuine issue as to the material facts in the instant cause, since such facts have been conclusively settled and determined by the final judgment or decree of this Court in the aforesaid criminal action between the same parties.

By reason of the foregoing, the plaintiff submits that it is entitled, as a matter of law, to the above-requested relief, including judgment in favor of the plaintiff and against the

defendant of liability for the unlawful acts recited in all counts of criminal indictment number 15993 and $2,000.00 as provided for in Revised Statutes 3490 and 5438, Title 40 U. S. C. §489(1), for the unlawful acts recited in the one count of said indictment, or a total of $2,000.00

/s/ G. Clinton Fogwell, Jr., United States Attorney.

/s/ Henry J. Morgan, Assistant United States Attorney.

[fol. 19]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT AGAINST RAYMOND JOSEPH KOLLER—Filed April 18, 1957

Now comes the plaintiff, the United States of America, by its attorney, G. Clinton Fogwell, Jr., United States Attorney, and moves this Honorable Court for Summary Judgment in favor of the plaintiff and against the defendant Raymond Joseph Koller in the above-captioned cause.

In support of said Motion, the plaintiff refers to Indictment number 15988 and judgment of conviction on all counts upon a plea of guilty thereon, the original of said Indictment and judgment of conviction being on record of this Court, and shows the Court that there is no genuine issue as to the material facts in the instant cause, since such facts have been conclusively settled and determined by the final judgment or decree of this court in the above-mentioned criminal action between the same parties.

By reason of the foregoing, the plaintiff submits that it is entitled, as a matter of law, to the above-requested relief, including judgment in favor of the plaintiff and against the defendant of liability for the unlawful acts recited in all counts of criminal indictment number 15988 and $2,000.00, as provided for in Revised Statutes 3490 and 5438, Title 40 U. S. C. §489(1), for each of the unlawful acts recited in each of the two counts of said indictment, or a total of $4,000.00.

G. Clinton Fogwell, Jr., United States Attorney.

Henry J. Morgan, Assistant United States Attorney.

[fol. 20]

IN UNITED STATES DISTRICT COURT

MEMORANDUM GRANTING AMENDED MOTION FOR SUMMARY JUDGMENT—August 5th, 1957.

The plaintiff's amended motion for summary judgment is resisted by defendant, Silverbrook, only on the ground that the plaintiff's action is barred by the statute of limitations. The same question was raised by this defendant's motion to dismiss which was decided, albeit reluctantly, against the defendant in an opinion filed July 16, 1956. Accordingly, summary judgment for the plaintiff will be entered in accordance with its amended motion upon submission by counsel of an appropriate order.

By the Court, /s/ C. William Kraft, Jr., J.

IN UNITED STATES DISTRICT COURT

JUDGMENT ORDER IN APPEAL No. 12371—August 7, 1957

And Now, August 7, 1957, plaintiff's Amended Motion for Summary Judgment having been granted, judgment is hereby entered in favor of the plaintiff and against the defendant, Raymond Joseph Koller, in the sum of $4,000.00.

By the Court: /s/ C. William Kraft, Jr., J.

[fol. 21]

IN UNITED STATES DISTRICT COURT

JUDGMENT ORDER IN APPEAL No. 12372—August 7, 1957

And Now, August 7, 1957, plaintiff's Amended Motion for Summary Judgment having been granted, judgment is hereby entered in favor of the plaintiff and against the defendant, Martin Silverbrook, in the sum of $2,000.00.

By the Court: /s/ C. William Kraft, Jr., J.

In United States District Court

Defendant's Notice of Appeal in Appeal No. 12371—Filed August 23, 1957

Notice is hereby given that Raymond Jerean Koller, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the final judgment entered in this action on August 7, 1957.

/s/ Robert H. Malis, for Malis, Malis & Malis, Attorneys for Appellant.

[fol. 22]

In United States District Court

Defendant's Notice of Appeal in Appeal No. 12372—Filed August 16, 1957

Notice is hereby given that Martin Silverbrook, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the final judgment entered in this action on August 7, 1957.

/s/ Robert H. Malis, for Malis, Malis & Malis, Attorneys for Appellant.

[fol. 23]

In the United States Court of Appeals
For the Third Circuit

No. 12,371

United States of America,

v.

Edward Doman, Alexander Joseph Doman, Raymond Jerean Koller, Morton Zeidman, Howard Albert Borden, Jack Leonard Erlbaum, John Daniel Guille, Martin Silverbrook, Joseph Henry Greenstone, Stanley Bear, Libers Ersal Shipton, Morris Shneer.

Raymond Jerean Koller, Appellant.

No. 12,372

UNITED STATES OF AMERICA,

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER.

MARTIN SILVERBROOK, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 19, 1958

Before BIGGS, Chief Judge, and GOODRICH and MCLAUGHLIN, Circuit Judges.

[fol. 24] OPINION OF THE COURT—Filed June 17, 1958

By Biggs, Chief Judge.

The two appeals at bar, arise out of a single case in the court below, and may be appropriately disposed of in a single opinion. This civil suit was instituted against the defendants under Section 26(b) (1) of the Surplus Property Act of 1944[1] to recover the sum of $2,000 and double damages for each of several fraudulent transactions alleged to have been engaged in by the defendants.

The United States filed motions for summary judgment against each of the defendants. Set out in the motions, as their bases, were indictments handed down against Koller and Silverbrook and others, alleging violations of Title 18, USC, 1940 ed. §80 (Mar. 4, 1909) C. 321 §35, 35 Stat. 1095. The asserted violations were that Koller and Silverbrook and others had engaged in a fraud upon the United States by filing false applications for priority in the purchase of

[1] Act of October 3, 1944, ch. 479, 58 Stat. 765 as amended, repealed, and reenacted as of June 30, 1949, ch. 288, Title II, Section 209, 63 Stat. 392, 40 U.S.C. § 489

property of the United States and were the identical acts alleged in the complaint in the present civil action. Both Koller and Silverbrook had pleaded guilty to the indictments and had been fined. The court below in the instant case correctly found that the pleas of guilty entered by Koller and Silverbrook in the criminal case referred to conclusively established the issue of fraud against them in the case at bar. On August 7, 1957 the court below entered judgment against both Koller and Silverbrook and the appeals at bar followed.

The acts complained of were committed by Silverbrook on March 15, 1946 and by Koller on July 12, 1945 and June 3, 1946. The complaint in the instant case was filed on May 12, 1955, more than nine years after the completion of the acts complained of. While the general rule is that [fol. 25] the statute of limitations ordinarily does not run against the United States, United States v. Summerlin, 310 U.S. 414 (1940), where the action brought by the United States is for the enforcement of a civil fine, penalty, or forfeiture, the statute of limitations is five years.[2] The narrow issue, therefore, is whether Section 26(b)(1) of the Surplus Property Act, which requires a person committing the prohibited act to pay the United States the sum of two thousand dollars for each fraudulent act in addition to double the amount of any damages which the United States may have sustained by reason of Koller's and Silverbrook's activities provides a civil fine, a penalty, or a forfeiture, or merely compensatory damages.

The United States, relying upon the opinion of the Supreme Court in Rex Trailer Co. v. United States, 350 U.S. 148 (1956), argues that the Surplus Property Act does not impose a civil fine, a penalty or a forfeiture and therefore the statute of limitations set forth in Section 2462, 28 U.S.C., does not bar suit on the claims before this court. Koller and Silverbrook contend that Section 26(b)(1) does impose a civil penalty and since the decision of the

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[2] "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . ." 28 U.S.C. § 2462.

Supreme Court in Rex Trailer did not deal with the statute of limitations issue it affords no authority for the determination of the issue at bar. We cannot agree with defendants' contentions.

In Rex Trailer the Supreme Court had before it the issue of whether the Rex Trailer Company, which had pleaded nolle contendere to a charge of fraudulently purchasing motor vehicles under the Act, and had been fined in that criminal proceeding, was subjected to double jeopardy when sued by the United States in a civil action under Section 26(b)(1) to recover $2,000 for each prohibited act, the acts complained of being those set out in the indictment in the criminal case. The court held in substance that [fol. 26] the recovery sought under Section 26(b)(1) was civil in nature and did not put the Trailer Company in jeopardy in violation of the Fifth Amendment.

The principal question presented for decision in Rex Trailer v. United States was stated to be whether the provisions of Section 26(b)(1) are civil or criminal. While the issue in Rex Trailer was one of double jeopardy, the Court, 350 U.S. at p. 149, stated that certiorari was granted to resolve an asserted conflict between the decisions of the Courts of Appeals. In footnote 2 it stated, "In considering whether the statute of limitations contained in 28 U.S.C. §2462 applied to §26(b)(1) of the Suplus Property Act the Fifth Circuit held §26(b)(1) to be a civil remedy in United States v. Weaver, 207 F. 2d 796, 797, and the Sixth Circuit held it to be penal in United States v. Witherspoon, 211 F. 2d 858."

In holding that Section 26(b)(1) of the Surplus Property Act created a statutory right in the United States to recover liquidated damages which were thought by the Court to be reasonable, we believe that the Court intended to put at rest the "asserted" conflict between the circuits. See United States v. Hougham, 148 F. Supp. 715 (S.D. Cal. 1957); United States v. Schneider, 139 F. Supp. 826 (S.D. N.Y. 1956); dissenting opinion of Judge Madden in Erie Basin Metal Products, Inc. v. United States, 150 F. Supp. 561, 566-7. But see the majority opinion in Erie Metal Products v. United States, supra.

We are of the opinion that Section 26(b)(1) does not provide for a penalty but is remedial in nature. We are buttressed in this view by the opinion of the Supreme Court in United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). This case involved an action under the False Claims Act, 31 U.S.C.A. §231, which contained language similar to that in Section 26(b)(1) of the Surplus Property Act. It provides that a person who commits certain frauds upon the United States " . . . shall forfeit and pay to the United States the sum of $2,000, and in addition, double the amount [fol. 27] of damages which the United States may have sustained. . . . " The Court held that this provision for the recovery of $2,000 and double damages for each fraud was a compensatory civil remedy and therefore was remedial in nature. The Court stated, 317 U.S. at p. 551, "We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure the government would be made completely whole."

The opinion in Marcus v. Hess was handed down on January 18, 1943. The Surplus Property Act, which employed virtually identical language, was enacted on October 3, 1944. As Mr. Justice Clark stated in footnote 4 cited to the text at 350 U.S. at p. 152, of Rex Trailer, "Under these circumstances it would be very difficult to say that these words which provided a civil remedy in the False Claims Act were not intended to provide the same kind of remedy in the Surplus Property Act."

Moreover, it should be noted that Section 26(b) contains three subsections.[3] The latter two clearly provide

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[3] Section 26(b) of the Surplus Property Act, Title 40 U.S.C. § 489 provides as follows:

> "(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States, or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

for multiple damages in the form of or as liquidated damages. These two subsections provide without question [fol. 28] a remedy clearly compensatory in nature. Both the wording of Section 26(b) and the pertinent Committee Report, S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14, show that the United States was to have the option of selecting as its remedy any one of the three different measures of damages. It is a reasonable construction of the section that Congress intended all three subparagraphs of Section 26(b) to be in pari materia. We cannot hold that Congress intended that the first of the three subsections set up a penalty section and the other two provided merely for compensatory liquidated damages.

The fact that Section 26(b)(1) allows for the recovery of $2,000 in addition to the double damages does not make that section punitive. In Helvering v. Mitchell, 303 U.S. 391 (1938) a 50% assessment upon those who committed fraud under the Revenue Act of 1928 was not considered a penalty, but rather was held to be a civil administrative sanction of a remedial nature. See Scadron's Estate v. Commissioner, 212 F. 2d 188 (2 Cir. 1954), cert. den. 348 U.S. 832 (1954); Kirk v. Commissioner, 179 F. 2d 619 (1 Cir. 1950); Reimer's Estate v. Commissioner, 180 F. 2d 159 (6 Cir. 1950).

The nature of the recovery is not altered by the inability of the United States in the case at bar to show actual damage, since, as was held in Rex Trailer Co., the remedy provided by 26(b)(1) is comparable to a recovery under

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"(1) shall pay to the United States the sum of $2,000. for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

"(2) shall, if the United States shall so elect, pay to the United States, as *liquidated damages*, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

"(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as *liquidated damages* any consideration given to the United States or any Government agency for such property." (Emphasis added.)

a liquidated damage provision which fixes compensation for anticipated loss. That the United States had a legitimate proprietary interest in insuring the disposal of its surplus materials to veterans in accordance with the announced policy and objectives of the Surplus Property Act, and that it suffered compensable damage under the statute by defendants' manifest perversion of that policy are propositions which have been settled beyond the need for further review. Rex Trailer Co. v. United States, supra; United States v. Bound Brook Hospital, 251 F. 2d 12 (3 Cir. 1958); Daniel v. United States, 234 F. 2d 102 (5 Cir. 1956).

[fol. 29] We conclude that Section 26(b)(1) provides for compensatory damages, and that the statute of limitations, Section 2462, 28 U.S.C., did not bar this action in the court below. The judgment of the court below will be affirmed.

[fol. 30]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,371

UNITED STATES OF AMERICA,

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERT ERSAL SHIPTON, MORRIS SHNEER,
RAYMOND JEREAN KOLLER, Appellant.

On appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: Biggs, Chief Judge, and Goodrich and McLaughlin, Circuit Judges.

JUDGMENT—June 17, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,372

UNITED STATES OF AMERICA,

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER,
MARTIN SILVERBROOK, Appellant.

On appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: Biggs, Chief Judge, and Goodrich and McLaughlin, Circuit Judges.

JUDGMENT—June 17, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

[fol. 32] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 33]

SUPREME COURT OF THE UNITED STATES

No. 362, October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—November 17, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and case transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.